Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	**WC Docket No. 04-313**
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	**CC Docket No. 01-338**

To: The Commission

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COMMENTS

Qwest Communications International Inc. ("Qwest") hereby submits its Comments in response to the Commission's *Order and Notice of Proposed Rulemaking* concerning unbundled access to network elements.[1]

SUMMARY

In conducting this fourth attempt to adopt lawful unbundling rules in accordance with the Telecommunications Act of 1996 (the "1996 Act"), the Commission must keep in mind that the 1996 Act is to be implemented with an eye to creation of a competitive telecommunications marketplace, and was not devised to assure cheap or permanent wholesale markets for competitors who do not construct or purchase their own facilities. And the law is very clear that, once competition has been established, further unbundling is not only unlawful but harmful to competition, consumers and providers of telecommunications services (incumbents and newcomers alike). Today there is not a single serious, unbiased industry analyst who suggests that the local

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[1] *Unbundled Access to Network Elements,* WC Docket 04-313, *Order and Notice of Proposed Rulemaking,* FCC 04-179 (Aug. 20, 2004) (*Order and NPRM*), *summarized,* 69 Fed. Reg. 55128 (2004).

exchange telecommunications marketplace has natural monopoly characteristics. Nevertheless, we now face yet another rulemaking in which some parties will inevitably seek to force incumbent local exchange carriers ("ILECs") to unbundle their networks and give these components to their competitors as unbundled network elements ("UNEs") at below-cost Total Element Long Run Cost ("TELRIC") prices. The Commission should pay no heed to such attempts to trump the statutory imperative that competition, not protection of a special group of competitors, is the goal of the Act and the limit of the agency's authority.

Three court decisions have made it clear that the Commission's approach to unbundling to date has been fundamentally misguided. Now, the Commission needs to follow the courts' directives. The following legal principles are critical if the Commission is to implement a lawful unbundling regime consistent with the 1996 Act:

- A valid, fact-based impairment finding must be made before any unbundling determination; impairment cannot be presumed. This is especially the case if competitive local exchange carriers ("CLECs") and other proponents of unbundling, as in the past, decline to submit information concerning their own operations so their claims of "impairment" can be evaluated intelligently.

- The impairment analysis must start from a presumption of no impairment. Both the statute itself and the economic and societal costs associated with unbundling require an initial presumption that unbundling is not warranted, unless and until this presumption is overcome by evidence of actual impairment.

- The Commission may not order unbundling of a network element unless it finds, with factual support, that an efficient competitor would be impaired due to the ILEC's natural monopoly advantages with respect to that element.

- If there is substantial competition in a market, unbundling cannot be required — even if that competition is primarily from intermodal competitors (that is, competitors who choose to provide only retail, and not wholesale, services).

- Impairment must be judged based on the actual or potential availability of the element *without* consideration of the TELRIC price that would apply if unbundled. The price of a UNE is relevant only *after* impairment is found and cannot form a basis for a finding of impairment.

- The Commission cannot, under any circumstances, permit the conversion of existing tariffed special access facilities to UNEs at a TELRIC price, because the very existence and use of tariffed facilities in a competitive marketplace precludes a finding of impairment. A carrier's actual use of facilities furnished by the ILEC under tariff precludes any finding of impairment, as a matter of law.

- The Commission cannot find impairment with respect to facilities constructed by an ILEC subsequent to the 1996 Act, because no natural monopoly characteristics are associated with such facilities.

- The existence of alternative sources of supply that can be and are used by competitors to provide services to end user customers in a given product market precludes a finding of impairment in that market. Such sources include functionally equivalent substitutes for a network element through:

    - Self- and third-party provisioning and

    - ILEC provisioning via tariffs or commercial agreements.

The Commission has, ever since the passage of the 1996 Act, consistently viewed the unbundling of ILEC network elements at TELRIC prices as the primary means of addressing competition in the local exchange marketplace. The three courts which have vacated the FCC's unbundling rules have made it clear that mandatory unbundling, especially at TELRIC rates, is not an unmitigated good. To the contrary, such unbundling impedes facilities-based competition, depresses network investment by all players, deters the development of true competition, disserves consumers, and has the capacity to cause severe economic harm to ILECs in particular and the telecommunications industry in general. Unbundling cannot be ordered unless the statutory impairment standard has been met.

While there may have been impairment in a number of areas in 1996 when the statute became law, such is not the case today. The Commission knows the telecommunications environment has changed tremendously since 1996. It recently noted that some observers believe that technological and competitive changes mean that the "business of land-line carriers is threat-

ened."[2] ILECs' substantial loss of market share, due to intermodal and other sources of competition, makes an impairment finding almost impossible. Indeed, with each ILEC customer that is lost, the benefits of unbundling decrease and the costs increase. Chairman Powell observed that this "dynamic, fast-changing environment . . . is peculiarly ill-suited to the century-old telephone model of regulation."[3] In fact, technological innovation has fulfilled the key objective of the 1996 Act — increased competition in local and long-distance telephone service, providing consumers with competitive alternatives. Today, consumers have an array of choices to meet their telecommunications needs, including offerings from cable providers, wireless carriers, municipal networks, and IP-based services.

As a result of these legal and factual predicates, the Commission must conclude the following in the case of the network elements under study in this proceeding:

- Switching cannot be ordered unbundled in any market.
- Transport cannot be ordered unbundled in any market.
- DS3 loops cannot be ordered unbundled in any market.
- DS1 loops can be ordered to be unbundled only in very limited circumstances.

These conclusions are compelled by the 1996 Act and the guidance provided in the three court decisions vacating the FCC's prior unbundling rules.

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[2] *IP-Enabled Services,* WC Docket 04-36, *Notice of Proposed Rulemaking,* 19 F.C.C.R. 4863, 4866, para. 3 n.11 (2004) (*IP-Enabled NPRM*).

[3] *IP-Enabled NPRM,* 19 F.C.C.R. at 4951 (Statement of Chairman Michael K. Powell); *see also id.*, 19 F.C.C.R. at 4953 ("We stand at the threshold of a profound transformation of the telecommunications marketplace, as the circuit-switching technology of yesteryear is rapidly giving way to IP-based communications.")(Statement of Commissioner Kathleen Q. Abernathy) ; *accord id,* 19 F.C.C.R.. at 4995 ("We all marvel at the transformative potential of new IP services. They sizzle with possibility for consumers and businesses alike.") (Statement of Commissioner Michael J. Copps); *id.*, 19 F.C.C.R. at 4956 ("VoIP and IP based services will provide consumers with . . . more competition and greater choice . . . [and are] mov[ing] toward becoming a substitute for traditional telephony services . . . .") (Statement of Commissioner Kevin J. Martin); *id.*, 19 F.C.C.R. at 4957 ("All indications are that IP is becoming the building block for the future of telecommunications.") (Statement of Commissioner Jonathan S. Adelstein).

In the case of switching, transport and DS3 loops, the analysis is simple and compelling. The market is highly competitive and application of mandatory unbundling to these elements would be both unlawful and counterproductive. As is pointed out in detail below, residential and business consumers are today receiving the benefits of competition that precludes a finding of impairment for carriers using these elements due to their availability from multiple sources using both traditional technology and newly proven technologies: competitive telephone companies (including both CLECs in a given area and ILECs expanding their coverage to extend into other ILECs' service areas), broadband providers (including providers of IP-enabled services such as Voice over Internet Protocol ("VoIP") and similar telephony services), cable providers (including those providing cable-based circuit-switched telephony and those offering cable modem service that makes VoIP available), and wireless providers (both mobile and fixed).

Back in 1996, the prevailing wisdom was that, to compete in the local market, a new entrant needed to have a network that mirrored all of the "network elements" of the ILEC' circuit-switched networks. The FCC reasoned that incumbent carriers should be required to unbundle those network elements that could not readily be duplicated by a new entrant (and even some that could). Today, to compete with an incumbent local exchange carrier, a competitor no longer has to replicate the traditional circuit-switched local exchange network's topology. Alternatives made possible by intermodal competitors and packet-based services make it unnecessary for a new entrant to construct its own circuit-switched local exchange network or lease sections of it from the incumbent as UNEs. In this environment, requiring unbundled access to switching, transport, and DS3 loops makes no more sense than requiring that railroads provide trucks with access to railroad tracks as cargo jets fly overhead. Even in the unlikely instance that impair-

ment can be found for these elements, unbundling should not be required because of the adverse impact on other goals of the Act.

DS1 loops, too, should not be unbundled in most instances, but they present a more complicated analysis because, while competitive sources of supply for DS1 loops exist in most locations, there are areas where the only current realistic alternative to a UNE DS1 loop is the ILEC-provided special access DS1 loop. Even here the law precludes an impairment finding in most instances, based on four critical legal principles:

- ***An impairment finding must be based on the suitability of a market for competitive entry.*** An impairment finding *cannot* be based on the cost or price differential between a DS1 UNE and a special access DS1 loop.[4] These are functionally equivalent, and the availability and use of special access DS1 circuits precludes any finding that the LEC has failed to provide access to a required network element, much less that a competitor is impaired by such failure. Where DS1 circuits are available under tariff, they can be used for competitive entry, as demonstrated by their widespread use for that purpose in all parts of the country.

- ***Use of a tariffed special access facility precludes a finding of impairment.*** The fact that a DS1 loop has been purchased and is being used to serve a customer is conclusive proof that the carrier is not impaired with respect to that DS1 loop, irrespective of any other circumstances of that particular market. A carrier using an existing special access DS1 loop can add local traffic and incurs no incremental cost, up to the loop's capacity. Accordingly, under no circumstances can an existing circuit or part of a circuit be converted from special access to UNE prices. Moreover, the carrier can acquire additional DS1 loops to carry additional local exchange traffic on the same route, which ensures that it is not impaired with respect to its ability to meet future requirements.

- ***Impairment cannot be justified on the basis that lower prices for access for interexchange services might help a carrier provide local service.*** In fact, any impairment analysis of a network element that is used for both long distance and local service must recognize that the use or availability of the element for long distance service will, in most instances, negate the possibility of impairment in the case of local service.

- ***Any impairment analysis must recognize that local exchange use of a DS1 loop represents only part of the total use of that loop.*** Because an efficient competitor

[4] A special access DS1 "loop" is properly referred to as a "channel termination." In the interest of clarity, we will use the term "loop" or "circuit" herein.

> would use a DS1 loop for multiple purposes, any DS1 loop cost relied on to establish impairment must be limited to the incremental cost assigned to those services for which impairment can lawfully be found. In other words, if a carrier reasonably can be found to be able to use the incremental capacity of a tariffed DS1 loop to provide local service efficiently, an impairment finding with regard to DS1 loops cannot be made where the tariffed DS1 service is available.

Application of these principles precludes a finding of impairment when tariffed DS1 special access circuits are available and can be used in the provision of a given service. As a result, there will be few, if any, instances where impairment can be found with respect to DS1 loops. Unbundling is thus precluded.

In acknowledging these legal and factual realities, which differ markedly from those of 1996, the Commission should adopt procedures for a lawful, rational transition away from unbundling rules that are no longer justifiable. In doing so, the Commission should recognize that commercial agreements currently available from ILECs, such as Qwest's Qwest Platform Plus ("QPP") offering, can form the basis for a smooth transition.

The Commission also must bring order to certain elements of the regulatory environment. It must clarify that it has sole jurisdiction over carrier agreements that are not mandated under section 251 (and thus subject to state jurisdiction under section 252). It also must re-assert its sole jurisdiction over BOCs' obligations to unbundle elements under the section 271 competitive checklist. Such obligations are strictly limited, and do not include an obligation to combine elements, make elements available at TELRIC rates, or unbundle broadband fiber loops. Finally, the Commission should reaffirm its decision in the *Triennial Review Order* to eliminate certain unbundling requirements, such as line sharing.

DISCUSSION

I. UNBUNDLING DETERMINATIONS MUST BE MADE IN ACCORDANCE WITH *IOWA UTILITIES, USTA I, AND USTA II*

A. The Courts' Decisions Focus on The Limited Use of Unbundling Under the Act

1. The "Maximum Unbundling" Policy of the Past Was and Is Unlawful — Unbundling Is a Last Resort, Not Standard Operating Procedure

The Commission should abandon any attempt to reimpose its maximum unbundling policy — a policy that is at odds with the statute's impairment standard and which has suffered three judicial vacaturs. The 1996 Act made unbundling a tool to be employed only when it is needed to open a service up to competition. It was never intended to be a routine benefit for competitors. The Courts have recognized that such a policy interferes with incentives for innovation and investment by both CLECs and ILECs and undercuts statutory objectives such as universal service and advanced services.

The Commission's initial unbundling rules, which presumed national impairment in the incorrect belief that the statute established unbundling as the norm,[5] were rejected by the Supreme Court in *Iowa Utilities.*[6] The Court found that the Commission had overreached, saying that "if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided." The Court noted that the FCC "misunderst[ood]" the statute and that its "premise was wrong," because "Section 251(d)(2) does not

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[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket 96-98, *First Report and Order,* 11 F.C.C.R. 15499, 15631-35, 15635-38, 15640-44, paras. 258-263, 268-70, 277-288 (1996) (*First Local Competition Order*).

[6] *Iowa Utilities,* 525 U.S. at 386-90.

authorize the Commission to create isolated exemptions from some underlying duty to make all network elements available. It requires the Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the 1996 Act and giving some substance to the 'necessary' and 'impair' requirements."[7]

Justice Breyer wrote separately to emphasize that "the statute's unbundling requirements, read in light of the Act's basic purposes, require balance. Regulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risk costs that, in terms of the Act's objectives, may make the game not worth the candle."[8] He added, "I believe the FCC's present unbundling rules are unlawful because they do not sufficiently reflect or explore this other side of the unbundling coin. . . ."[9]

After remand, the Commission again attempted to require extensive nationwide unbundling.[10] The D.C. Circuit, in *USTA I*,[11] rejected "the Commission's expression of its belief that in this area more unbundling is better," stating that the FCC needed to provide a "more concrete" rationale than "its belief in the beneficence of the widest unbundling possible."[12]

Meanwhile, the Supreme Court considered the related issues of TELRIC pricing for unbundled elements and combinations of unbundled elements in its *Verizon* decision, which was issued just weeks before *USTA I*.[13] The Court there upheld the use of TELRIC as a reasonable

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7 *Id.*, 525 U.S. at 391-392.

8 *Id.*, 525 U.S. at 429-30 (Breyer, J., concurring in part and dissenting in part) (footnote omitted).

9 *Id.*

10 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking,* 15 F.C.C.R. 3696, 3725-50, paras. 51-116 (1999).

11 *USTA I,* 290 F.3d 415.

12 *USTA I,* 290 F.3d at 425.

13 *Verizon Communications Inc. v. FCC,* 535 U.S. 467 (2002) (*Verizon*).

implementation of cost-based pricing for UNEs, premised in part on the fact that there was no record showing that TELRIC pricing had discouraged facilities-based competition.[14] The Court upheld the FCC's decision to require ILECs to provide UNE combinations, but its decision was premised on the assumption that the network elements to be combined were properly subject to unbundling in the first place.[15] Justice Breyer, concurring in part and dissenting in part, pointed out that the Court agreed that the statutory goal was "the substitution of competition for regulation in local markets — where that transformation is economically feasible."[16] He addressed at considerable length the statute's requirement of unbundling only to the extent necessary to overcome the incumbent's natural monopoly advantages.[17]

Thereafter, the Commission tried yet again to impose a broad unbundling scheme on the industry. In its *Triennial Review Order,* the Commission acknowledged that there was no "general duty to unbundle," but it nevertheless made a broad national finding of impairment with respect to several network elements, subject to state-by-state overrides.[18] The D.C. Circuit's *USTA II* decision, in response, vacated many of the FCC actions and provided detailed guidance for the Commission's future efforts to implement unbundling. The Court was critical of the Commission's continued efforts to subject ILECs to vague unbundling standards:

> [I]n at least one important respect the Commission's definition of impairment is vague almost to the point of being empty. The touchstone of the Commission's impairment analysis is whether the enumerated operational and entry barriers "make entry into a market uneconomic." Uneconomic by whom? By *any* CLEC, no mat-

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14 *Id.*, 535 U.S. at 506, 516-17.

15 *Id.*, 535 U.S. at 531-538.

16 *Id.*, 535 U.S. at 544 (Breyer, J., concurring in part and dissenting in part).

17 *Id.*, 535 U.S. at 547-48.

18 *Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket 01-338, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking,* 18 F.C.C.R. 16978, 17026-27, 17121-28, 17159-67, 17170-75, 17213-23, and 17247-86, paras. 72, 234-246, 302-314, 320-327, 380-393, 435-485 (2003) (*Triennial Review Order* or *TRO*).

> ter how inefficient? By an "average" or "representative" CLEC? By the most efficient existing CLEC? By a hypothetical CLEC that used "the most efficient telecommunications technology currently available," the standard that is built into TELRIC? [19]

The Court thus required the Commission to follow a decisonmaking path more in tune with the 1996 Act. Unbundling is an extreme remedy, not a first resort, and should be employed only in instances where the Commission confronts all of the costs of unbundling, not just the supposed benefits. This is an important concept, one which the Commission has recognized in the context of fiber-to-the-home, for example, and it must be borne in mind as the Commission addresses switching, high-capacity loops, and transport in this proceeding. The Court emphasized that the FCC was not free to impose all the burdens and costs of making competition possible on the ILEC, observing that "[i]n competitive markets, an ILEC can't be used as a piñata."[20]

2. The Statutory Objectives Are to Foster Facilities-Based Competition and to Introduce Innovative Technologies and Services

Section 251(d)(2) must be interpreted in light of the purposes underlying the 1996 Act.[21] Accordingly, in *USTA II,* the Court observed that "the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition — preferably genuine, facilities-based competition."[22]

As the statute itself and both *USTA I* and *USTA II* make plain, facilities-based competition is unquestionably the primary objective of the 1996 Act. Many of its provisions seek to fos-

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19 *USTA II,* 359 F.3d at 572 (citations omitted).

20 *USTA II,* 359 F.3d at 573.

21 *See Hibbs v. Winn,* 124 S.Ct. 2276, 2285 (2004), *citing General Dynamics Land Sys. v. Cline,* 124 S.Ct. 1236 (2004).

22 *USTA II,* 359 F.3d at 576.

ter facilities-based competition in the provision of local exchange service.[23] Its goal is to transform local telecommunications, long considered a natural monopoly, to a marketplace in which multiple providers compete to provide more efficient and innovative service over their own facilities.[24] Congress recognized that it would not be possible in all instances for new entrants to duplicate *every* aspect of a local telephone network immediately, so it chose to allow CLECs to obtain "[s]ome facilities and capabilities" from the ILEC.[25]

At the same time, the 1996 Act also sought to advance technological innovation and encourage its deployment. Section 706 enjoins the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[26] This is consistent with the statutory objective set by Section 7 of the Communications Act of 1934 (the "Act") — "to encourage the provision of new technologies and services to the public."[27] Moreover, the *USTA II* Court found that "Section 706(a) identifies one of the Act's goals

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[23] *See* 47 U.S.C. § 214(e)(1)(A) (eligible telecommunications carrier may receive universal service support only to extent it provides service "using its own facilities or a combination of its own facilities and resale"); § 251(a)(1) (duty to interconnect with "facilities and equipment" of other carriers), (b)(4) (duty to provide other carriers with access to conduits, ducts, and physical rights of way); § 251(c)(2) (duty to interconnection "facilities and equipment" of other carriers with the local exchange network); § 251(c)(6) (duty to provide for "physical collocation" of other carriers' "equipment"); § 256 (interconnection of networks); § 271(c)(1)(A) ("presence of a facilities-based competitor" providing telephone exchange service "either exclusively over [its] own telephone exchange service facilities or predominantly over [its] own telephone exchange service facilities in combination with . . . resale"); *see also* 47 U.S.C. § 253(c) (requiring that state and local regulation of rights-of-way be on a competitively neutral and nondiscriminatory basis).

[24] *See, e.g.*, S. Conf. Rep. No. 104-230, at 148 (1996) (finding that "meaningful facilities-based competition" is possible). Justice Breyer has pointed out that the 1996 Act itself "says that its objective is to substitute competition for regulation." *Verizon*, 535 U.S. at 544 (Breyer, J., concurring in part and dissenting in part), *citing* Telecommunications Act of 1996, Preamble, 110 Stat. 56 (stating that the goal of the Act is to "promote competition and reduce regulation" in both the local and long distance telecommunications markets) and H.R. Conf. Rep. No. 104-458 at 1 (1996).

[25] *Id.*

[26] Telecommunications Act of 1996, Pub. L. No. 104-104, § 706(a), 110 Stat. 153, 47 U.S.C. § 157 note (1996). To achieve this objective, the statute urges the Commission not only to foster competition but also to use "regulating methods that remove barriers to infrastructure investment."

[27] 47 U.S.C. § 157(a).

beyond fostering competition piggy-backed on ILEC facilities, namely, removing barriers to infrastructure investment."[28]

B. A Finding of Impairment is a Prerequisite for Unbundling — Impairment Cannot be Presumed, and the Commission Has the Burden of Supporting an Impairment Determination

The threshold unbundling question is whether a carrier is impaired[29] by not having a network element furnished as a UNE — that is, whether a reasonable and efficient carrier's ability to offer a service is impaired by some natural-monopoly-related characteristics of the requested network element. This test is marked by the suitability of the properly defined market for competitive entry in the absence of access to the UNE, and is not dependent on the actual existence of competition.[30] The statute itself makes clear that the Commission has the obligation to make a valid finding of impairment as a prerequisite to any unbundling ruling.

The "at a minimum" clause establishes that at the very least the Commission must find impairment before it orders unbundling, and that unbundling may not be ordered in the absence of evidence of impairment due to the ILEC's failure to provide a network element. The statute singles out impairment as the one factor the Commission *must* resolve. Congress did not leave the decision to the Commission's discretion pursuant to a broad public interest standard; instead, it *required* the Commission to make an impairment determination in order to unbundle.

The Commission cannot discard or minimize the one critical factor prescribed by Congress as a prerequisite to unbundling. The *USTA I* Court said that the Commission could not simply find that "more unbundling is better," because Congress did not give it that "open-ended"

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28 *USTA II*, 359 F.3d at 579.

29 The impairment standard applies to nonproprietary network elements, which are the focus of these Comments. The standard for unbundling proprietary network elements is whether they are "necessary."

30 *See, e.g., USTA I*, 290 F.3d at 426-27 (Commission must consider whether "the cost characteristics of an 'element' render it at all unsuitable for competitive supply").

discretion and instead "made 'impairment' the touchstone."[31] *USTA I* thereby made clear that a finding of impairment is an essential prerequisite to any unbundling determination.[32] In *USTA II,* the Court reiterated this principle, holding that a finding of impairment was "a *specific statutory requirement*."[33]

Given this elementary requirement, the Commission cannot presume impairment; impairment exists only where there is evidence permitting the lawful conclusion that the ILEC has failed to furnish access to a network element and that competitors are impaired thereby. There is no impairment until this factual determination is made. Thus, the Commission has the burden of finding where impairment exists, not of finding the exceptions where there is no impairment. If the Commission does not make a finding supported by substantial evidence that competitors in a given area will be impaired, there is no impairment in such areas, and no unbundling is permitted under Section 251.

The absence of evidence of impairment does not mean that the FCC is powerless to examine and correct market failures or other public interest matters within the overall scope of its jurisdiction. It cannot, however, do so by ordering unbundling under Section 251(c)(3) at TELRIC rates. Its authority to order unbundling at TELRIC prices is limited to those instances where

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31 *USTA I,* 290 F.3d at 425.

32 The *TRO* premises its view that impairment is not a necessary prerequisite on the statement in *USTA I* that "to the extent that the Commission orders access to UNEs in circumstances where there is little or no reason to think that its absence will genuinely impair competition . . . we believe it must point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible." *TRO,* 18 F.C.C.R. at 17086-87, para. 172, *quoting USTA I,* 290 F.3d at 425. In fact, the *USTA I* decision's description of impairment as the "touchstone" and its express rejection of the notion that Congress had endorsed the greatest unbundling possible make clear that the Court did not view impairment as being optional, where unbundling is concerned.

33 *USTA II,* 359 F.3d at 567 (emphasis added). Moreover, the Supreme Court clearly viewed a finding of impairment as essential when it rejected the standardless "maximum unbundling" policy: "We cannot avoid the conclusion that, [if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all.] It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided." *Iowa Utilities,* 525 F.2d at 390.

impairment may lawfully be found, as required by Section 251(d)(2), and the other costs associated with unbundling do not outweigh the benefits.

C. The Key Impairment Issue Is Whether a Competitor's Impairment Is Due to the Natural Monopoly Characteristics of a Network Element

1. Natural Monopoly Characteristics of a Network Element

The court decisions make clear that any impairment determination must explicitly connect the cost and difficulty of obtaining a network element, absent Section 251(d)(2) unbundling, to natural monopoly characteristics of the network element that make it economically wasteful to attempt to supply that network element competitively. In making Section 251(d) impairment and unbundling determinations, the Supreme Court held, the Commission must give effect to the 1996 Act's objective of transforming the provision of local telecommunications from a "regulated . . . monopolistic public utilit[y]," [34] to a competitive, multi-provider, facilities-based marketplace. The Supreme Court's *Iowa Utilities* decision said that in determining whether there is impairment, the Commission must "apply *some* limiting standard, rationally related to the goals of the Act," such as the "essential facilities" doctrine.[35] The Supreme Court in *Verizon* notes that "entrants may need to share some facilities that are very expensive to duplicate . . . in order to be able to compete in other, more sensibly duplicable elements."[36] Justice Breyer echoed this view: "the basic congressional objective is reasonably clear. The unbundling requirement seeks to facilitate the introduction of competition where practical, *i.e.*, without inordinate waste."[37] Later,

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34 *Verizon*, 535 U.S. at 477.

35 *Iowa Utilities*, 525 U.S. at 388. The Court mentioned the essential facilities doctrine only by way of illustration and did not advocate the use of this doctrine, which was developed in other contexts and does not deal directly with the issues at hand in this proceeding.

36 *Verizon*, 535 U.S. at 510 n.27.

37 *Iowa Utilities*, 525 U.S. at 428 (Breyer, J., concurring in part and dissenting in part).

in *Verizon,* he indicated that the issue was whether the ILEC "retain[s] a 'natural monopoly'" over the network elements sought, such that "duplication of those 'elements' would prove unnecessarily expensive. The new Act does not require the new entrant and incumbent to compete in respect to those elements, say, through wasteful duplication."[38]

The D.C. Circuit has fleshed these concepts out further. In *USTA I,* the Court pointed out that "cost disparities . . . are universal as between new entrants and incumbents in *any* industry," and that such typical cost disparities cannot "be reasonably linked to the purpose of the [1996] Act's unbundling provisions," given the costs resulting from unbundling.[39] The need to balance the costs and benefits of unbundling in the context of the purpose of the Act led the Court to conclude that for a cost disparity to be evidence of impairment, it must be "linked (in some degree) to natural monopoly," in that it must be "based on characteristics that would make genuinely competitive provision of an element's function wasteful," with an analysis of "whether the cost characteristics of an 'element' render it . . . unsuitable for competitive supply."[40] The *USTA I* Court agreed that the normal definition of natural monopoly was appropriate: economies of scale and scope over the range of reasonable demand, not merely at the startup stage.[41]

In *USTA II,* the Court noted that the Commission's test — whether entry would be "uneconomic" — was too vague; it did not indicate for *whom* it would be uneconomic to enter, and the economics of entry would be different for different entrants, depending on their efficiency.[42] In fact, the Commission had actually answered this question in the *TRO,* where it said that im-

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38 *Verizon,* 535 U.S. at 545-46 (Breyer, J., concurring in part and dissenting in part).

39 *USTA I,* 290 F.3d at 427.

40 *Id.*

41 *Id.* ("But average unit costs are necessarily higher at the outset for any new entrant into virtually any business. The Commission has in no way focused on the presence of economies of scale 'over the entire extent of the market.' Without a link to this sort of cost disparity, there is no particular reason to think that the element is one for which multiple, competitive supply is unsuitable.") (citations omitted).

42 *USTA II,* 359 F.3d at 572.

pairment must be determined with respect to a rationally structured, economically efficient carrier, and that the statute does not require unbundling to meet the unique business plans of particular carriers.[43] It held that such an entrant would not be "impaired if it could serve the market in an economic fashion using its own facilities, considering the range of customers that could reasonably be served and the services that could reasonably be provided with those facilities."[44] Thus, the determination must be made whether entry would be uneconomic for a company "utilizing *the most efficient network architecture available* to an entrant . . . [,] based on *the most efficient business model for entry* rather than . . . any particular carrier's business model."[45] This was and is the correct focus of any impairment determination: whether natural monopoly characteristics of a particular network element make that network element (or substitutes for it) effectively unavailable, in the absence of Section 251(d)(2) unbundling, to a competing company using the most efficient network architecture for providing its services. In making this determination, *USTA II* held, the Commission must consider not only whether there are alternative sources already in place, but also whether other similar facilities deployment that has occurred is evidence bearing on whether entry is economically feasible for an efficient competitor.[46] Likewise, *USTA II* requires the Commission to consider intermodal alternatives in deciding whether entry is economically feasible.[47]

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43 In the *TRO,* the Commission said that it "will not, as some commenters urge, evaluate whether individual requesting carriers or carriers that pursue a particular business strategy are impaired without access to UNEs. We recognize that section 251(d)(2) refers to 'the telecommunications carrier seeking access,' but such a subjective, individualized approach could give some carriers access to elements but not others, and could reward those carriers that are less efficient or whose business plans simply call for greater reliance on UNEs. Providing UNEs to carriers with more limited business strategies would also disregard the availability of scale and scope economies gained by providing multiple services to large groups of customers." 18 F.C.C.R. at 17056-57, para 115 (footnotes omitted).

44 *TRO,* 18 F.C.C.R. at 17056-57, para. 115.

45 *TRO,* 18 F.C.C.R. at 17303, para. 517 (emphasis added).

46 *USTA II*, 359 F.3d at 575.

47 *Id.*, 359 F.3d at 572.

USTA I had made clear that the fact that a CLEC will have more difficulty entering a particular market without access to TELRIC-based UNEs than with them is not the proper focus of an impairment analysis.[48] Because it is always difficult and costly to enter a market as a start-up company, the FCC must "pin 'impairment' to cost differentials based on characteristics that would make genuinely competitive provision of an element's function wasteful."[49] In *USTA II,* the Court noted with approval that "the Commission has clarified that only costs related to structural impediments to competition are relevant to the impairment analysis."[50]

In performing this analysis, the Commission must take into account the 1996 Act's elimination of some factors that might otherwise have given rise to natural monopoly characteristics. For example, Section 251(b)(4), in particular, removes some "natural monopoly" obstacles to competitive deployment of facilities by giving competitors "access to the poles, ducts, conduits, and rights-of-way" of any local exchange carrier,[51] which facilitates transport and loop deployment, and Section 224[52] facilitates competition by both cable operators and other providers of telecommunications services by providing access to any "pole, duct, conduit, or right-of-way owner or controlled by a utility."[53] The Commission also must consider whether the functional equivalent of a requested network element is already available to the competitor from the ILEC itself or from others.

The existence of competition in any given geographic area is powerful evidence of a lack of impairment in other areas with similar characteristics. For example, if there is substantial

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48 *USTA I,* 290 F.3d at 427.

49 *Id.*

50 *USTA II*, 359 F.3d at 572.

51 47 U.S.C. § 251(b)(4); *see also* 47 U.S.C. § 251(b)(3) (stating a duty to provide dialing parity and nondiscriminatory access to numbering resources, operator services, directory assistance, and directory listing).

52 47 U.S.C. § 224.

53 47 U.S.C. § 224(a)(4).

competition in a town of 100,000 this would suggest a lack of impairment both in that particular town and other towns of similar size and similar economic characteristics. On the other hand, the fact that competition has not developed at a given point in time in some places does not demonstrate impairment, because the Commission must determine, at a minimum, that the lack of competition and the inability of a reasonably well-financed provider to compete without wasteful duplication of facilities in that market are due to natural monopoly characteristics.

Accordingly, the Commission's impairment analysis must take into account all of the potential alternative sources of supply of a network element, including intermodal sources.[54] This means that the Commission must consider, with respect to any given network element, whether that element has either been deployed or can be deployed by third parties or by the carrier itself. Evidence that facilities have been deployed by non-ILECs in many different locations indicates the general feasibility of such deployment and justifies a presumption that such facilities could be deployed in other locations, and thus that such facilities can be secured from a non-ILEC source at any location where demand warrants deployment.

2. Because Newly-Constructed ILEC Facilities Do Not Have Natural Monopoly Characteristics, They Are Not Subject to Section 251(d)(2) Unbundling

An impairment analysis that is based on the economic infeasibility of duplicating ILEC facilities with natural monopoly characteristics must be limited to network elements that the

[54] The Commission must consider the effects of intermodal competition in two different ways — both as an alternative source of supply for self- or third-party provisioning of the network element at issue and in determining whether the service the requesting carrier seeks to offer is one in which competition exists without dependence on unbundling of the network element in question (and in some cases without need for the element at all, because of the technology employed). If a given line of business is robustly competitive without reliance on UNEs, due to the use of intermodal alternatives to wireline circuit-switched telephone network elements, then there is no justification for engaging in an impairment analysis at all — a company need not rely on the ILEC or its technology, disposing of any question as to whether the ILEC has anything akin to a natural monopoly on an essential element of the business. For example, the rapid emergence of intermodal competition from VoIP strongly suggests that the importance of circuit switching for the provision of local exchange service has waned dramatically, popping the "natural monopoly" balloon.

ILEC already had in place when the 1996 Act became law, or shortly thereafter. The only facilities with respect to which an ILEC even arguably has any "natural monopoly" or "first mover" advantages are facilities that were constructed before the 1996 Act opened entry to competitors. An ILEC's cost to construct new facilities does not materially differ from the cost that would be incurred by a new entrant or third party. The Commission recognized as much in the *TRO* when it considered the issue of "greenfield" fiber-to-the-home:

> [T]he barriers faced in deploying fiber loops . . . may be similar for both incumbent LECs and competitive LECs. Both incumbent and competitive LECs must purchase fiber and the associated equipment, negotiate access to the necessary rights-of-way, obtain any necessary government permits, hire skilled labor, and manage their construction projects in order to deploy fiber loops. Moreover, by some estimates, competitive LECs enjoy advantages that incumbent LECs do not have, such as lower labor costs and superior back office systems.[55]

The same considerations apply with equal force to other new construction subsequent to the 1996 Act. Network elements that are part of an ILEC facility — switch, loop, or transport — constructed after the 1996 Act cannot be considered to have natural monopoly characteristics merely because they were constructed by an ILEC, because the ILEC no longer had any monopoly-based advantage in constructing them. Any economies of scale that may have resulted from the ILEC's former legal monopoly in the provision of local exchange service are absent as to facilities constructed after that monopoly was terminated in 1996. As a result, the Commission cannot find that an efficient competitor would be impaired by the ILEC's failure to provide such network elements without Section 251(d)(2) unbundling due to the natural monopoly characteristics of such post-1996 network elements.

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55 *TRO*, 18 F.C.C.R. at 17124-25, para. 240 (footnote omitted).

D. The Impairment Determination Turns on Lack of Access, Not Whether TELRIC Would Be Cheaper than an Available Alternative

The issue of impairment cannot be based on a comparison of two prices for obtaining the same network element from the ILEC (*i.e.,* tariff *vs.* TELRIC), but must depend on whether a requesting carrier lacks any realistic alternative to unbundled access. As difficult as it may be today to separate the issue of unbundled access from TELRIC, that is what the statute intended. In *USTA II,* the Court emphasized that these are separate issues, holding that the impairment determination turns on whether CLECs "*don't have access* to UNEs (at *whatever* rate the Commission might prescribe)."[56]

Congress was trying to jump-start local exchange competition, which was still nascent (and in some states, illegal) when the 1996 Act became law. It recognized that competitors might not have any economically rational source for some network elements needed to introduce competition to the market other than the incumbent's own network, so it provided for unbundling of elements not already furnished by the incumbent, where necessary to make these elements available. It also established general standards for the price of such elements. These were two separate steps: First, a determination is made whether a network element must be unbundled, which only occurs if, at a minimum, competitors lack access to the network element (or reasonable substitutes) and are impaired thereby.[57] Only after deciding that unbundling is necessary

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56 *USTA II,* 359 F.3d at 577 (emphasis added).

57 By focusing on whether a requesting carrier has *access* to a network element on an unbundled basis or not, instead of whether the element is available at or near a TELRIC *price,* the Commission can also avoid the trap of creating impairments through its own regulatory action. If the issue were whether a competitor is impaired by not having access to a network element *at TELRIC,* versus having to pay a higher, yet just and reasonable, regulated price at which it is readily available, such as a tariffed or contract rate, the Commission would inevitably be faced with an artificial impairment caused by its own disparate pricing standards that would require unbundling without any connection to natural monopoly characteristics. This would be, of course, just a new version of the "maximum unbundling" policy that the courts have repeatedly rejected. The Commission cannot establish a regulatory scheme that envisions two different regulated prices for a given network element and then find that competitors are impaired
(footnote continued)